No. 80-1544

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In the Supreme Court of the United States

OCTOBER TERM, 1980

BLUE GRASS PROVISION CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner terminated its delivery employees and immediately and permanently subcontracted their work without giving the Union prior notice or an opportunity to bargain about the change and its effects.

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1-7) is reported at 636 F. 2d 1127. The decision and order of the National Labor Relations Board (Pet. App. 8-29) are reported at 238 N.L.R.B. 910.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1980. The petition for a writ of certiorari was filed on March 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 30-32.

STATEMENT

1. Petitioner Blue Grass Provision Co., Inc. is engaged in the processing and wholesale distribution of meat products at its Covington, Kentucky facility (Pet. App. 14; A. 45-47).[1] For many years, Blue Grass entered into successive collective bargaining agreements with the Union[2] covering its truckdrivers (Pet. App. 15; A. 34-35). During the 1974-1977 contract, Blue Grass employed five truck drivers, four of whom had from 20 to 28 years of service (Pet. App. 16; A. 36-38). The fifth driver, Scudder, had 10 years of service. Because of a lack of work, he was placed on layoff status and worked as a relief driver when the other drivers were absent or on vacation (Pet. App. 16; A. 37).

In 1975, without notice to the Union, petitioner began using an independent contractor to perform Scudder's relief driver work. In late 1975, in response to a grievance filed by Scudder, an arbitrator determined that Blue Grass had violated the contract by assigning Scudder's duties to non-unit personnel, and ordered appropriate relief (Pet. App. 16; A. 24, 42).

In November 1976, the Union notified petitioner of its desire to terminate the 1974-1977 contract, scheduled to expire on January 31, 1977, and requested a meeting to negotiate a new agreement (Pet. App. 16; A. 28). Thereafter, in a telephone conversation with Company President William Rice on or about January 14, Union Business Agent Fred Batsche requested that negotiations be delayed and the current contract extended for 30 days until industry-wide negotiations were completed; Batsche noted that in the past petitioner had agreed to a contract that was

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[1] "A." refers to the appendix in the court of appeals.

[2] Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

similar to that worked out with the major meat packing firms in the area (Pet. App. 17; A. 78, 79). Rice agreed only to extend the contract 11 days—to February 11, 1977 (Pet. App. 17; A. 27, 29, 79). Contemporaneously, Rice began contacting outside carriers to inquire about subcontracting the drivers' work (Pet. App. 17; A. 32-33, 40-41, 53-54). Prior to his first meeting with the Union, Rice determined that one carrier's proposal was too expensive (Pet. App. 17; A. 32-33, 53-54), and that a second carrier was interested in taking over petitioner's delivery work (A. 55-56, 40).

On January 25, Rice and Batsche held their first negotiating session (Pet. App. 18; A. 27, 80). Batsche gave Rice a set of the Union's written contract proposals, incuding one that would have banned subcontracting (Pet. App. 18; A. 26, 80). Rice reviewed the proposals, asked several questions, complained about the overall cost of the package, and asked for additional time to study the proposals (Pet. App. 18; A. 80-82). Rice and Batsche did not discuss subcontracting at this negotiating session, nor did Rice mention that he had contacted or was negotiating with an outside carrier to make petitioner's deliveries (Pet. App. 22, 18; A. 81-82, 99-100).

On January 28, President Rice and Business Agent Batsche met again to discuss the contract (Pet. App. 18; A. 82). Rice informed Batsche that he wanted to negotiate a contract that would protect the Company's drivers so "that they could retire through attrition" as he was "contemplating getting out of the trucking business" (Pet. App. 18; A. 83). Batsche replied that "at this point" he could not agree to this proposal (*ibid.*), and inquired specifically whether Rice proposed to recall the relief driver, Scudder, to full time status when one of the regular drivers retired. After Rice stated emphatically that he would not recall Scudder from layoff, Batsche said that he could not accept a contract under which bargaining rights would be lost through attrition (Pet. App. 18; A. 83-84, 101). The meeting ended when

Rice told Batsche that, if the Union would not agree to eliminate the unit through attrition, petitioner could not reach a contract. Batsche asked if Rice was refusing to negotiate further; Rice replied that he was. Batsche then asked Rice to reconsider, but left the meeting with the understanding that Rice would not change his position (Pet. App. 19; A. 70, 85-86).

On January 31, Batsche met with the drivers and informed them of petitioner's proposal to eliminate their jobs through attrition. Batsche also advised the relief driver, Scudder, that the Company did not plan to recall him from layoff but intended instead to have a subcontractor do his work. The drivers then voted to strike at the February 11 expiration of the extension agreement (Pet. App. 19; A. 86-87).

On February 7, President Rice, upon the advice of his attorney, called Business Agent Batsche to make sure that he understood petitioner's position (Pet. App. 19; A. 65). On this occasion, as on January 28, the only subcontracting proposal advanced by Rice to the Union called for the full-time drivers to continue working until they retired, and for a subcontractor to take over the unit work as it became available through attrition (Pet. App. 22, 18-19; A. 87-88, 55-56). At the end of the telephone call, Batsche asked Rice if he was refusing to negotiate further, and Rice confirmed that he was (Pet. App. 19; A. 43, 65-66). Following this conversation, however, Rice concluded that he had "laid an egg in saying that I did not wish to negotiate" (A. 66). The next day, February 8, Rice sent Batsche a letter indicating that petitioner was interested in further negotiations and hoped Batsche would "offer some alternatives to our plight" (Pet. App. 20; A. 25, 42-43, 67). This letter was delivered to the Union's office on February 10, but was not seen by Batsche until some time later (Pet. App. 20; A. 88-89).

Following his February 7 conversation with Batsche, Rice made arrangements for a subcontractor to supply drivers for petitioner's trucks on February 14 if an agreement were not worked out with the Union by the time the contract expired on February 11 (A. 67-69). At the close of business on February 11, Rice informed the four full time drivers that "they were through" (Pet. App. 20; A. 38, 43); the Union learned of the discharges from the employees (A. 89-90). On Monday, February 14, a subcontractor, Kent Express, began making deliveries in petitioner's trucks (Pet. App. 20; A. 38-39, 69-70).[3]

At no time during the negotiations with the Union did petitioner ever propose terminating its drivers immediately and permanently subcontracting their work; its only proposal had been to subcontract each driver's work as he retired (Pet. App. 22, 18-20; A. 87-90). On the evening of February 14, following their discharge and replacement by the subcontractor, the employees met with their union representatives. On the following day, they began picketing Blue Gress (Pet. App. 20; A. 97-98, 102-103). Thereafter, the Union refused to pursue further negotiations until petitioner "put the unit back as it was" (Pet. App. 20 n.6; A. 105).

2. On the foregoing facts, the administrative law judge rejected petitioner's contention that it gave proper notice that it was considering subcontracting the drivers' work and bargained to impasse with the Union before implementing its proposals (Pet. App. 20-21). The administrative law judge found that petitioner gave notice "only of its desire to subcontract out unit work over a period of time as the unit

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[3]Prior to the termination of the drivers and the subcontracting of their work, petitioner owned two trucks and leased three others; sometime after February 11, petitioner purchased the three trucks it had previously leased (Pet. App. 20; A. 43-44, 68-70).

employees retired" and never notified the Union "that it would immediately and permanently subcontract out all its unit delivery work and discharge its drivers upon the termination of the extension agreement on February 11, 1977" (Pet. App. 22). Noting petitioner's letter of February 8 inviting further negotiations, the administrative law judge found that the parties "had not even reached any impasse on the issue of eventual or gradual subcontracting" (Pet. App. 23). He further found that, even assuming the negotiations were at impasse on this issue, "it would not change the result" since "any bargaining over the proposed gradual subcontracting of unit work over a period of time, cannot be deemed to have satisfied [petitioner's] obligation to bargain about the very different proposition of the *immediate* subcontracting of *all* unit work" (*ibid.*). Accordingly, the administrative law judge concluded, *inter alia*, that petitioner violated Section 8 (a)(5) and (1) of the National Labor Relations Act by unilaterally subcontracting out all its truckdriving work, thereby eliminating the entire bargaining unit, without giving the Union notice and an opportunity to bargain about the change (*ibid.*).

The Board affirmed the administrative law judge's rulings, findings and conclusions, and ordered petitioner, *inter alia*, to cease subcontracting its delivery operations "without prior notice to or bargaining with the Union" (Pet. App. 10), to restore its delivery operations, to reinstate and make whole for lost pay all unit employees discharged on February 11, and to bargain in good faith with the Union regarding any future subcontracting of unit delivery work (Pet. App. 10-11, 28-29).[4]

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[4]The Board found, contrary to the administrative law judge (Pet. App. 24-26), that it was unnecessary to decide whether petitioner had terminated the contract without complying with the 30-day mediation and 60-day bargaining requirement set forth in Section 8(d)(3) and (4) of the Act since the scope of the remedy for this alleged violation is

3. On review, the court of appeals concluded that the Board's findings were supported by substantial evidence and, accordingly, enforced the Board's order (Pet. App. 1-7). In rejecting petitoner's contention that it had given adequate notice of its intentions and had bargained to impasse over its subcontracting proposal, the court observed that, while the term "impasse" is not subject to precise definition, at a minimum "it encompasses the notion that both sides are aware of precisely what is at issue and that they have made more than a perfunctory attempt to reach a resolution" (Pet. App. 5). The court's examination of the record failed to uncover any evidence that petitioner ever unequivocally informed the Union of an intention "to subcontract work on a definite date" (*ibid.*) and revealed instead that there was "considerable doubt whether the Union ever understood [that petitioner] meant to terminate the bargaining unit upon expiration of the contract * * *" (Pet. App. 6). The meetings between the parties were, said the court, "at best preliminary sparring matches," a conclusion reinforced by petitioner's "own letter of February 8 evidencing its willingness to talk further with the [U]nion" (*ibid.*).[5]

ARGUMENT

1. The first question presented in the petition (Pet. I)—whether an employer's decision to terminate a portion of its operations for economic reasons is a mandatory subject of

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essentially identical to the remedy imposed for the Section 8(a)(5) violation found by the Board (Pet. App. 9-10 n.4). Member Murphy would have found petitioner liable for the additional violation (*ibid.*).

[5]Similarly, the court rejected petitioner's contention that its subcontracting of bargaining unit work was equivalent to a lockout in support of its bargaining demands (see Pet. App. 6-7, distinguishing *Lane* v. *NLRB*, 418 F. 2d 1208 (D.C. Cir. 1969)), and found further that petitioner had failed to advance legitimate and substantial business justifications comparable to those advanced by the employer in *Lane* (Pet. App. 6-7).

bargaining under Section 8(a)(5) of the Act—is not properly raised here. In the proceedings before the Board, petitioner did not dispute that it was obliged to bargain with the Union before contracting out its delivery operations and terminating its drivers; instead petitioner contended that it had satisfied its obligation by giving the Union notice and an opportunity to bargain about the proposal (Pet. App. 20-21). Accordingly, Section 10(e) of the Act, 29 U.S.C. 160(e), precludes petitioner from challenging in this Court its obligation to bargain. *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-256 (1943). Moreover, petitioner did not question its duty to bargain before the court of appeals (Pet. App. 4), and where issues are neither raised before nor decided by a court of appeals, this Court ordinarily will not consider them. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's decision to utilize the employees of a subcontractor to drive its delivery trucks is the kind of proposed activity held to be a mandatory subject of bargaining in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964). The vitality of *Fibreboard's* holding is not questioned in *First National Maintenance Corp.* v. *NLRB*, No. 80-544 (argued Apr. 21, 1981), which involves not the replacement of employees by a subcontractor, but the decision to terminate a portion of an operation.

2. The second question presented in the petition (Pet. I)—whether an employer who bargains with a union about subcontracting unit work must reach impasse with the union before implementing the decision—is also not properly raised here. This question, like the first, was not raised before either the Board or the court of appeals; below, petitioner argued simply that it had in fact bargained to impasse (Pet. App. 5, 20-21).

Furthermore, although the Board has expressed its respectful disagreement with the Fifth Circuit on the question whether an employer ordinarily must bargain to impasse with a union before implementing proposals (compare *Winn-Dixie Stores, Inc.* v. *NLRB*, 567 F. 2d 1343 (1978), with *Winn-Dixie Stores, Inc.*, 243 N.L.R.B. No. 151 (Aug. 2, 1979)), the issues dividing the Board and the Fifth Circuit are not presented here. Thus, whatever the extent of an employer's obligation to bargain, it is uncontroverted that *at a minimum* an employer normally must give a union notice of its proposal and a reasonable opportunity to bargain about it.[6] Even in the Fifth Circuit, an employer who implements changes substantially different from those it discussed with the union fails to meet this minimum requirement and accordingly violates Section 8(a)(5) and (1). *Winn-Dixie Stores, Inc.* v. *NLRB, supra*, 567 F. 2d at 1349-1350.

Here, the administrative law judge found that petitioner, by discharging its senior drivers and permanently subcontracting their work, implemented a change substantially different from its proposal to subcontract its delivery work as each driver retired, and that petitioner never gave the Union notice and an opportunity to bargain about this change prior to its implementation (Pet. App. 21-24). The only question for review, therefore, is whether this finding is supported by substantial evidence. Such an evidentiary determination, sustained by both the Board and the court of appeals, does not warrant further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as shown in the Statement, the Board's findings are amply supported by the record and its legal conclusions are in

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[6]See, *e.g.*, *NLRB* v. *Crystal Springs Shirt Corp.*, 637 F. 2d 399, 402-403 (5th Cir. 1981); *NLRB* v. *J.P. Stevens & Co.*, 538 F. 2d 1152, 1162-1164 (5th Cir. 1976); *Firch Baking Co.* v. *NLRB*, 479 F. 2d 732, 735-736 (2d Cir.), cert. denied, 414 U.S. 1032 (1973).

accord with settled authority. *NLRB* v. *Katz*, 369 U.S. 736 (1962); *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Contrary to petitioner's suggestion (Pet. 7, 10-11), this case does not present the issue whether an employer may, without bargaining, lock out its employees for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position. Petitioner discharged its drivers at the expiration of the contract (Pet. App. 24, 22, 20; A. 38-43); it did not lock them out contingent on their accepting petitioner's proposals to subcontract unit work as each driver retired.

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